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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

CHARLES M. THOMSON, TRUSTEE OF THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

WILLIAM F. BOLES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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I.

PRELIMINARY STATEMENT

(Figures in parentheses refer to pages of the record.)

This is a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals of the Eighth Circuit in the above entitled cause. The opinion is reported in 123 F. (2d) 487. The action was brought to recover damages for personal injuries and jurisdiction is predicated upon the Federal Employers' Liability Act (35 Stat. 65, Ch. 149, 45 U. S. C. A., Sec. 51-59).

Petitioner's counsel have failed correctly to state the facts in their petition and supporting brief. They have failed to view the evidence in its aspects most favorable to respondent and have failed to give respondent the benefit of all reasonable inferences fairly deducible therefrom. However, in view of the nature of the questions presented, no detailed

statement of facts will be necessary. In deference to the rule of this court requiring the abbreviation of briefs, our supplemental statement of facts will be characterized by appropriate brevity.

THE QUESTION INVOLVED

Apparently petitioner now admits that the evidence was sufficient to sustain the verdict and it is not now contended that petitioner is entitled to prevail as a matter of law. The only questions raised by petitioner relate to the facts and to the evidence exclusively. There is no genuine dispute nor controversy concerning any applicable principle of law. There is no important rule of law at stake. The question, simply stated, is whether principles which are clear and undisputed were correctly applied by the trial and the appellate courts below. It is urged here as grounds for the issuance of a writ that:

1. The trial court erred in the admission of evidence;

2. The trial court erred in its instructions to the jury;

3. That respondent's counsel was guilty of misconduct.

We believe that it can easily be demonstrated in this brief that:

First: No special and important reasons exist that would warrant the issuance of a writ.

Second: There is no Federal question of substance involved unless rulings on evidence and nice questions of phraseology in the trial court's charge in practically every case under the Federal Employers' Liability Act are to be so considered.

Third: The legal principles involved are not in need of alteration or re-definition.

Fourth: That no prejudicial or reversible error was committed by the trial court.

We shall assume that the members of this court are familiar with the facts stated clearly and accurately in the opinion of the Circuit Court of Appeals (421-435). This opinion in itself answers each and every question raised by petitioner with the citation of appropriate authority.

II.

STATEMENT OF FACTS

The accident occurred and respondent was injured by the collapse of a bridge railing which resulted from decayed, defective wood and corroded metal and a negligent splice. The respondent was leaning against the railing for the purpose of transmitting signals to the engineer of his crew. These facts were established to the point of demonstration.

The bridge in question was not under any general reconstruction; the only work that was being done consisted of driving piles and getting ready to raise it later on in the season (55, 103, 104). The work was not intended to be completed for perhaps several years (185, 235, 270). In the meantime the bridge was in use for the operation of trains (253) and the walk-way and hand railing were supposed to be kept in good, safe condition while the work was in progress (235, 236, 254), especially for the protection of trainmen like Mr. Boles (255).

It was necessary and important to keep it safe while the work was in progress (254). This was the duty of the bridge and building crew and *not* the train crew (242).

The position which respondent occupied was the safest and most convenient of all because:

1. He was up against the railing and out of the way of

the men working around there and carrying tools and materials and walking to and fro on the foot path (74, 80, 110, 120).

2. It is necessary to stay clear of the steam and water and the chips that fly from the block of wood when the hammer is in operation (26, 79).

3. The crane can swing around and revolve and if you are close enough it will hit you (80).

4. The farther you get out from the side of the train in giving signals, the better the engineer can see you (81, 296).

5. The pile driver is wider than an ordinary car (80).

6. He couldn't give signals from the ground because it was down in a hole and too deep and he couldn't hear the pile driver foreman and the engineer couldn't see him (98-9).

7. The big plank or timber between the rail and the pedestrian walk has bolts sticking up several inches and a man cannot walk there safely (186, 187).

The employees frequently leaned on the railing and would holler to somebody on the ground if they wanted different things; other employees had been doing the same thing on the day of the accident (30, 31, 74, 75, 295). The conductor of the crew, who was respondent's superior officer, was occupying the same position at the time of the accident (215, 217). He, the conductor, testified as petitioner's witness that respondent's position and conduct were proper and customary (217-219). Just as the conductor started to lean against the railing, he heard a cracking or popping noise like splintering wood (218), and both of them fell backwards into space and down to the ground below (29, 81, 212).

The wood of the railing was weather rotted and decayed so that you could pick it out with your nails or a spike, and the nail holes were rusty and worn too large (34). The splice, applied to make the railing safe (156, 174, 191) was wholly inadequate for this purpose (257, 258).

III.

POINTS AND AUTHORITIES

A. The rule requiring ordinary care to supply a reasonably safe place to work was correctly given in the trial court's charge.

Southern Ry. Co. vs. Bennett, 233 U. S. 80.

Meyers vs. Pittsburgh Coal Co., 233 U. S. 184.

Woods vs. Lindvall (8th Cir.), 48 F. 62.

Cawman vs. Penn.-Reading Seashore Lines (3rd Cir.), 110 F. (2d) 832.

Kenmont Coal Co. vs. Patton, 268 F. 334.

Northern Pac. R. Co. vs. Schoeffler, 193 F. 627.

McDonald vs. City of Duluth, 93 Minn. 206, 100 N. W. 1102.

Penson vs. Inland Empire Paper Co., 73 Wash. 338, 132 Pac. 39.

Mercury Mining Co. vs. Chambers (Ark.), 102 S. W. (2d) 543.

Nolen vs. F. O. Engstrum Co. (Cal.), 166 Pac. 346.

Johnson vs. Doubleday, 102 Atl. 1038.

B. There was no reversible or prejudicial error in the admission of evidence.

Galveston, H. & S. A. Ry. Co. vs. Summers (Tex.), 278 S. W. 881.

Bird vs. Johnson, 199 Minn. 252, 272 N. W. 168.

Willett vs. Great Northern R. Co., 154 Minn. 10, 191 N. W. 260.

Egan Chevrolet Co. vs. Bruner, 102 F. (2d) 373.

C. The trial court did not abuse its discretion in denying a new trial on the ground of alleged misconduct.

1. The question is not open for review because of the failure of petitioner's counsel to make a timely objection.

Ocean Accident & Guarantee Corp. vs. Penick & Ford, 101 F. (2d) 493.

London Guaranty & Accident Co. vs. Woelfle, 83 F. (2d) 325.

2. Remarks provoked or invited by adverse counsel do not constitute prejudicial misconduct.

Fidelity & Casualty Co. of N. Y. vs. Niemann, 47 F. (2d) 1056.

Gooddale vs. Hathaway (Ore.), 39 Pac. (2d) 678.

Twachtman vs. Connelly, 106 F. (2d) 501.

U. S. vs. Socony-Vacuum Co., 310 U. S. 150.

IV.

ARGUMENT

A.

The Trial Court Correctly Charged the Jury With Respect to Petitioner's Duty to Exercise Ordinary Care.

It is contended by petitioner that "the court actually charged the jury that the defendant was an insurer of the safety of the railing, instead of advising them of the correct legal rule incorporated in the requested instructions" (Petitioner's Brief, p. 18). There is no merit in this claim. The Circuit Court of Appeals in its opinion quotes verbatim that

portion of the charge which was held to have sufficiently stated the correct rule (435). In addition to the excerpt quoted by the Circuit Court of Appeals, the following two paragraphs adequately and sufficiently cover the requested instructions of the petitioner and are sufficiently favorable to him (375):

> "The defendant is not an insurer of the safety of its employees or of the plaintiff in this case. The mere fact that an accident has occurred and that the plaintiff has been injured, does not justify a verdict for the plaintiff. A person may meet with an accident and sustain injury where no one is at fault or it may be that some third party was solely to blame, or it may happen that the person injured was the one at fault himself, and under such circumstances there can be no recovery. If the plaintiff's injuries resulted purely from accident, or if they were caused exclusively by negligence on the part of the plaintiff, then he is not entitled to recover. * * *"
>
> "* * * Of course, if the plaintiff was sitting on the railing and lost his balance and fell, he is not entitled to recover."

Thus it will be seen that the trial judge submitted petitioner's theory of the case and specifically advised the jury that petitioner was not an insurer. After outlining the claims of the parties, the court quoted from the Federal Employers' Liability Act, specifically calling attention to the use of the term "negligence" (373). The court then properly defined negligence (374). The trial judge also gave the customary instructions imposing the burden of proof upon respondent (376).

It is elementary that after the case is correctly submitted there should not be a reversal because of niceties of phraseology. If the principle of law be correct, that is sufficient. Whether it is couched in the exact phraseology of a requested instruction then becomes immaterial. The case of

Western Union Tel. Co. vs. Morris, 105 F. 49, 53,

relied on by petitioner, merely holds that in addition to the general rules, a party is entitled to an instruction which "tersely" states "the crucial issues." It is difficult to understand how the trial judge could more clearly and more tersely state the crucial issues than in the language above quoted that petitioner was not an insurer, that the accident itself did not warrant a recovery, and that if he lost his balance and fell he could not prevail. This more than meets the rule of the Morris case and with the portion quoted by the Circuit Court of Appeals (435) sufficiently advised the jury of the correct principle of law which governed and solved this controversy.

We note with interest that in the Morris case, *supra*, upon which petitioner places such great reliance, the first paragraph of the syllabus is as follows:

> "It is not error for a trial court to refuse to give instructions to the jury in the language of counsel, where the substance of these instructions is embodied in its general charge to the jury."

This principle is decisive and controlling on this branch of the argument.

B.

There Was No Prejudicial Error Committed by the Trial Court With Respect to the Admission of Evidence.

As found by the trial court and the Circuit Court of Appeals, respondent's counsel in good faith asked the respondent whether he was married and had a family and the respondent answered such questions before the objections were interposed. Petitioner's counsel did not move to strike the testimony from the record and did not request any instructions that the jury should disregard it (59, 60). He did nothing at all. When the belated objection was made, the trial court said:

"I think perhaps the matter should not be pursued further" (60).

The matter was not pursued further until petitioner's counsel opened up the subject both by evidence and argument.

He knowingly and intentionally introduced and took advantage of the same information upon cross examination, as follows:

1. By offering in evidence Defendant's Exhibit 1 containing the statement that plaintiff was married and had two children, girls, ages nine and eleven (114);
2. By then reading this entire Exhibit 1 to the jury himself (18);
3. By eliciting testimony that Boles had one of the kid's baby blankets cut up or folded to use in his brace (127);
4. By offering in evidence Defendant's Exhibit 3 and reading it to the jury (130), which was a letter written to the claim agent by respondent's wife;
5. By re-calling respondent for further cross examination and offering in evidence Defendant's Exhibit 13, which showed that respondent was married, and by reading this report of the accident to the jury (3, 6-10), which report was made out and written in the handwriting of respondent's wife (139);
6. By cross examining the plaintiff and asking him who accompanied him on the trip to Minneapolis and eliciting the answer, "my wife and my girls" (315);
7. By offering in evidence and reading to the jury himself Defendant's Exhibit 14 and by showing that it was written by Boles' wife (312, 313);
8. By mentioning Boles' family in the final argument and claiming credit for the railroad company having advanced $200.00 "to support his family in July" (330).

As noted by the Circuit Court of Appeals, a heated controversy developed upon the trial as to whether Defendant's

Exhibit 1 had been obtained by fraud and deceit. It was the claim of respondent that the claim agent by agreeing to advance money to respondent, took advantage of his necessitous circumstances. It was proper to show his situation at the time the money was advanced, or agreed to be advanced, and when the statements were signed, and the dependence of a family would be vitally important under these circumstances. But respondent was not permitted to show the entire situation and no further reference was made to the matter by respondent's counsel except to the extent necessary to answer petitioner's final argument.

The situation is thus very different from that presented in

Chicago and North Western Railway Co. vs. Kelly (8th Cir.), 74 F. (2d) 31,

wherein the very same judge who presided in the instant case, writing the opinion for the Circuit Court of Appeals, indicated that what transpired in the case at bar would not justify a reversal. It will thus be seen that the cases cited and discussed by petitioner's counsel are easily distinguishable.

Error without prejudice does not justify reversal. The doctrine of harmless error is incorporated in Rule 61 of the Rules of Civil Procedure for the District Courts of the United States. The doctrine was applied by the Minnesota Court in

Bird vs. Johnson, 199 Minn. 252, 272 N. W. 168:

> "Error in admitting evidence is no ground for new trial if the complaining party subsequently introduces substantially the same evidence."

The same rule applies in the Eighth Circuit Court of Appeals. See:

Egan Chevrolet Company vs. Bruner (8th Cir.), 102 F. (2d) 373.

Union Electric Light and Power Company vs. Snyder Estate (8th Cir.), 65 F. (2d) 297.

The mere disclosure, without comment, particularly in the absence of a motion to strike, of such a common and natural occurrence as that a man of the respondent's age should be married and have a family could not arouse the sympathy of reasonable jurymen. If this were true, a prejudicial result would follow if the wife and child of a litigant should attend upon the trial.

At any rate, the Circuit Court of Appeals has found that respondent's counsel acted in good faith and no prejudice resulted. In view of the provocative conduct and remarks of petitioner's counsel, to which attention will now be devoted, we cannot do better than to close this portion of the brief by quoting from the opinion below (433):

> "Nor should it be claimed that plaintiff's counsel was injecting inflammatory and prejudicial argument to the jury in this regard since it appears that, only a short time before, defendant's counsel in his argument emphasized that the company had paid plaintiff some $200.00 for the support of his family. All references to plaintiff's family were immaterial and unwarranted, but they were injected into the case by both counsel. Under different circumstances, the argument referred to might well justify reversal, but, for the reasons indicated, we do not believe the jury were improperly influenced or that any prejudice arose thereby."

C.

There Has Been No Abuse of Judicial Discretion in Denying a New Trial on the Ground of Alleged Misconduct.

At the close of the argument of respondent's counsel, petitioner made no objections, took no exceptions, and asked the court for no instructions concerning the statements now claimed to constitute misconduct (369). Again petitioner's counsel did nothing at all. Assuming that there was misconduct, it is settled that counsel must give his adversary

an opportunity to "eat his words," and he must, likewise, give the trial court an opportunity to remove the prejudicial effect of misconduct. The rule is the same in this court and in the court below.

As stated in

United States vs. Socony-Vacuum Oil Company, 310 U. S. 150, 238:

> "* * * In the first place, counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that comments to the jury were improper and prejudicial."

As noted in the opinion below, the approved practice in the Eighth Circuit had been set forth with great care and exactness in

London Guaranty and Accident Company vs. Woelfle, 83 F. (2d) 325.

Petitioner's counsel was thoroughly familiar with the rule. He was counsel for the defendant in the Kelly case (8th Cir.), first appeal, 74 F. (2d) 31, 36; second appeal, 84 F. (2d) 569. Upon the first appeal the court stated that he had not properly protected his record by objection and indicated that the defeated party, after the case is ended and no objections entered, should not be permitted to select from a long argument apparently objectionable features and present them as grounds for a new trial. After this decision, the court then decided the Woelfle case and Judge Sanborn outlined the required procedure for future guidance. Upon the second appeal in the Kelly case, the court specifically held and stated that petitioner's counsel had followed the practice specified in the Woelfle decision.

If petitioner's counsel, with knowledge of the rule and approved practice, remained silent and intended to speculate upon the outcome and attempt to secure a new trial in the

event of an adverse verdict, he thus followed a course which has been condemned by both this court and the court below.

The approved practice in the Eighth Circuit, under the Woelfle decision, requires that in order to save the question of misconduct for review, counsel must either:

1. Make an objection, take an exception, or move for a mistrial at the time of the alleged misconduct,

or

2. Where it involves the closing argument, counsel may and preferably should make his objection, take his exception, or ask for remedial action at the close thereof and before the case is submitted to the jury.

The non-action of petitioner's counsel with knowledge of the rule, prevents review of the questions now attempted to be raised.

D.

Assuming the Question Is Properly Presented for Review, It Does Not Appear That the Trial Court Abused Its Discretion in Denying a New Trial.

Both the trial court and the Circuit Court of Appeals have found that no prejudice resulted to petitioner from the remarks of respondent's counsel. In the opinion below it was said (433):

> "This case is not, in our opinion, a close one on liability. No contention is made that the damages were excessive."

Both lower courts in the case at bar have found that there was no passion or prejudice. In the cases relied upon by petitioner, of which

> *Minneapolis, St. P. and S. S. M. R. Co. vs. Moquin*, 283 U. S. 520,

is typical, the finding was exactly the other way. In that

case the lower courts found the verdict was excessive because of passion and prejudice and, referring to such finding, this court said:

> "The finding is quoted above, and our sole concern is as to the action it requires."

It is submitted that logic and justice require that in the case at bar this court should, likewise, accept the finding of the trial and appellate courts.

So also in

New York Central R. Co. vs. Johnson, 279 U. S. 310,

the Circuit Court of Appeals found that the remarks of counsel were unjustified and prejudicial and it was further stated that the trial judge by failing to sustain the petitioner's objection, had enhanced the prejudicial effect of the argument. In the case at bar this court should accord similar weight and respect to the finding of the Circuit Court of Appeals above quoted.

It seems to respondent that he was entitled to a directed verdict in accordance with his motion therefor (327, 328), because he proved conclusively that the accident resulted from petitioner's negligence. No doubt the Circuit Court of Appeals had this in mind in stating that the case was not a close one. With reference to damages, there was no contention below that the verdict was excessive. Counsel for petitioner did not even incorporate the medical evidence in the record, therefore it cannot be said that the remarks of respondent's counsel influenced the size of the verdict, which is really moderate and conservative.

Elementary is the rule expressed by the Oregon Court in *Gooddale vs. Hathaway*, 39 Pac. (2d) 678:

> "Ordinarily, such argument would be grounds for reversal, but in view of the fact that counsel for the defendant threw down the gage of battle relative to the matter of insurance, we think he must abide the consequences. The range of argument rests largely in the

discretion of the trial court, and, in the instant case, we see no abuse thereof. If error was committed, it was invited. No doubt counsel for the plaintiff was delighted to accept the challenge and it must be conceded that he made the most of his opportunities, but we are inclined to the belief, under all of the circumstances, that the jury was not controlled by passion or prejudice. The verdict was not large."

Remarks Relating to Venue and Jurisdiction.

Petitioner's counsel set out on a deliberate campaign at the very opening of his argument to instill poison and prejudice in the minds of the jury and to inject into the lawsuit wholly extraneous and improper elements. He sought to take advantage of the suspicion, prejudice, and even the petty provincialism of a farmer jury. He endeavored to weave a web of dark suspicion and started out by telling the jury there were many "peculiar" circumstances that he couldn't fix in his mind, but that were important; that plaintiff's counsel apologized for the lawsuit being there (which was untrue); that it was "queer" it was in Minnesota; that if a juror went to a lawyer in Scott County, or Goodhue County, or Houston County, with a case against a railroad, that they would not let their lawyer sue it some place else but would say, "I don't want to run away." He further said, "That is what has happened in this case," and added, "You have a right in determining this case to take that into consideration" (329, 330). He criticized the respondent for not bringing the case in Pekin, Illinois, saying again, "Aren't those circumstances queer, to say the least?" (331). He sought to prejudice the jury against respondent because he had employed a doctor and a lawyer in Minneapolis and made a trip for that purpose (330).

Counsel for respondent then had the option of either objecting to such improper remarks, or of remaining silent and

answering them. He chose the latter course. He had a right to counteract the poison and the prejudice intentionally aroused by petitioner's counsel. If a lawyer resorts to tactics of this kind, he ought to have the good sportsmanship to remain silent when his adversary accepts the challenge and answers in explanation, justification and retaliation. He cannot take advantage of remarks that were invited or provoked by his own misconduct.

It may be noted that respondent's counsel asked the jury to listen to the charge of the court on the question and, in seeking to overcome this prejudice, requested the jury to disregard the matter in its entirety in their deliberations (347).

The trial court properly instructed the jury that the venue and jurisdiction were proper and that the case should receive fair and impartial consideration (377).

The Investigation and Production of Evidence.

In his argument petitioner's counsel directly placed the *bona fides* of himself and the defense in general before the jury. He said that down where he lived he had learned that it paid to be fair and not to overstep in the recital of facts or draw conclusions that are not proper (328-9). Largely outside the record, petitioner's counsel told the jury that he brought every witness that knew anything about the case, which was grossly untrue, and said that he had witnesses in the city but sent them back because they didn't know anything about the case, and told the jury, "I have been as fair in the trial of this lawsuit as I could be" (342). In parading his honesty and fairness, he then ended up by saying, "I gave it to you because I think that is the way to try a lawsuit. Give the jury all the evidence that you can and give it to them honestly, and I think you will agree I have put into this

lawsuit all the evidence whether it was good or bad" (342). At the time he made these statements, claim agent Adamson was sitting in the court room. This record shows that the plaintiff wanted to cross examine him and that counsel agreed to permit it. However, petitioner's counsel did not call the claim agent to dispute one single word that Boles said about the money deal, the statement, Defendant's Exhibit 1, or anything else. At the time when petitioner's counsel was telling the jury that he had produced all the evidence, that he had been fair and honest, that he had given them everything good and bad, he had, no doubt, in his very brief case the photograph that was taken the day after the accident wherein Livingston posed for Boles and in exactly the same position that Boles was occupying at the time of the accident (300-1). *This would be the most important item of evidence in the whole lawsuit.* It would go to the very vitals of the case. IT WOULD SHOW WHETHER PLAINTIFF WAS RIGHT OR WRONG IN CLAIMING THAT THESE EMPLOYEES ORIGINALLY TOLD THE STORY THAT BOLES TOLD UPON THE WITNESS STAND AND THAT THE CLAIM AGENT MANUFACTURED, FRAMED, AND TRUMPED UP THE DEFENSE. It will be remembered that Livingston changed his story and that he said to Boles and Kalar that the claim agent tried to get him to change his story of the accident (318, 323). Livingston originally claimed that Boles was not sitting on the railing but merely leaning against it (317, 323). He demonstrated the method in exactly the manner testified to by Hannum and Boles (323, 325-6). In the original account prepared the very day after the accident Boles said he was leaning against the hand railing, which was evidently defective (308-9). This was not satisfactory to the superintendent (141-2). On June 17th Mr. Adamson took Defendant's Exhibit 1 from plaintiff Boles. Adamson put the word

"sitting" in the statement although Boles did not use that language (140-1). Boles did not know that Adamson had slipped the word "sitting" into the statement (141). Before Boles signed the statement some man had been to see him and they made an agreement or had an understanding about advancing money (144). Then Adamson came along and took Boles' statement and during the discussion and conversation he told Boles he would be down to see him and advance him some money (144-5). Likewise, in the statement taken by claim agent Adamson there was the fraudulent insertion that "there was no cracking noise." This is contrary to all the testimony in the case and Boles said he overlooked it in the statement (143). Boles signed Exhibit 1 when he had a lot of pain and the claim agent put in things he didn't say (117).

We have this picture: Immediately after the accident Boles gave a statement in accordance with his version at the trial. The superintendent was not satisfied. A man named Sullivan from the railroad made a deal to advance Boles some money. The claim agent came along and had a conversation and discussion with him about the money and took a written statement. Nothing could be better calculated to lull an injured employee into a sense of security than to agree to give him money at a time when he needed it. Immediately after the accident, in fact the very next day, claim agent Adamson went out to the scene of the accident and had Livingston, an eye-witness, assume exactly the same position in which he saw Boles at the time of the accident. He obtained a photograph of Livingston in this position. Another employee took Hannum's part in the photograph (300-1). He took other photographs the same day, which were actually introduced in evidence. Nothing was said about the one which would be the most important of all, and there was not one word of explanation for its non-production. Liv-

ingston orally stated that Boles was not sitting on the railing before he changed his version. Hannum agreed right down the line with Boles and didn't change his version.

We submit to any fair and impartial mind that these facts, coupled with a reading of the cross examination of Peatschman, should be sufficient to at least permit the argument that this defense was a frame-up and a fabrication. When counsel told the jury that the defense was framed, he was deadly in earnest; and nothing has transpired and nothing has been said in petitioner's brief to alter this abiding conviction. The failure to put Adamson on the witness stand and the failure to produce the significant photograph, together with the failure to produce:

1. Any one who knew anything at all about the repair of the railing,
2. Anyone who knew anything at all about the installation of the gate or the moving of the upright,
3. Anyone who knew anything at all about the installation of the splice,
4. Anyone who knew anything at all about the inspection, maintenance, or condition of the railing either before or after the accident,

stamped this defense as a false and dishonest one; at least, petitioner's counsel having opened the door as to its *bona fides*, respondent's counsel had a right so to argue.

Petitioner's counsel complains because respondent's counsel drew the inference or conclusion that had it not been for the testimony of Scamp, Exhibits 7, 8 and 9 would not have been produced. Wasn't this a fair argument? Petitioner's counsel criticized the respondent for not producing more evidence and witnesses. He put his own fairness and honesty in issue and said to the jury, in reckless disregard of the truth, that he himself had produced all the evidence whether good or bad. At the time he made this statement he must

have known it was false. He knew that he had not produced the vital photograph which was the most important piece of evidence in the lawsuit and he must have known that he had produced none of the vital witnesses to testify concerning the condition of the railing, the repairs made, the splice and other factors. If those conducting the defense in this case were not fair enough to produce the photograph or the important witnesses, what reason is there to suppose that they would produce the rotten railing had it not been for the fact that Scamp testified that the pieces were preserved and that several days after the accident he had seen them in the office of the general bridge foreman at South Pekin in a bundle? (36) Scamp described the defects, the decayed wood and the corroded metal (34-39), and in most respects, he was right. Respondent's counsel disclosed the basis of his reasoning and the foundation for his statement and said that after Scamp described the railing and its condition in detail, "they either had to bring in the railing or they had to deny that description and they couldn't very well bring witnesses in there and deny or dispute Scamp without bringing in that railing" (349). Perhaps the trial judge had the same thought in mind when he said in response to petitioner's objection:

> "There may be some reason that justifies that course of argument" (349).

The reference to the non-production of Montgomery was clearly provoked by petitioner's counsel. He again opened the door. He criticized and somewhat ridiculed the respondent and his counsel and his investigator for not producing petitioner's employees as witnesses. Both in fact and in law, the employees of one party are not considered as witnesses readily available to the other party to a lawsuit. They are considered and deemed to be available only to their employer. Counsel knows this rule of law. That did not prevent him,

however, from saying (333):

> "Then they send their investigator out there and he interviews witness after witness and he interviews Scotty, who says that he is a very good friend of Boles. They did not send Scotty, their friend, up here. They didn't bring in any of the other fellows they interviewed."

Witnesses out of the state could not be subpoenaed. Any lawyer who has had any experience with lawsuits against railroad companies knows that the employees of the latter are in mortal fear for their jobs. They are systematically and invariably advised by claim agents to give no information. Ordinarily they refuse to talk at all. It is ridiculous to suppose that they would co-operate with the other side in a lawsuit against their employer. This is just ordinary, common, human experience. But the petitioner's counsel criticized respondent for not producing petitioner's employees, who were not available to him, of course, and then he went further and told the jury what an honest man he, counsel, had been in the lawsuit, how he had given them all the evidence, good or bad (342), how he talked to all the witnesses, sent those home that knew nothing, and then said that he had been as fair as he could be (342) and had given the jury everything he had (343). If respondent can be criticized for the non-production of unavailable witnesses, then cannot the petitioner also be criticized for the non-production of unavailable witnesses, particularly in a case where he has falsely claimed the credit in front of the jury for production of "all the evidence." It will be noted that respondent's counsel did not say that Montgomery was an employee, at the time of trial. The remark about Montgomery simply illustrates the wisdom of the practice approved by Judge Sanborn in the Woelfle case. It was an inadvertent statement that could and should have been remedied had counsel objected to it and it simply constituted

an answer to his own unfair, improper, unjustified remarks concerning the non-production of evidence by respondent.

Petitioner's counsel did not hesitate to attack the honesty and impugn the veracity of Mr. Boles or Mr. Scamp or Mr. Kalar. As an advocate, he probably had the right to call them liars if he wished. The attack of respondent's counsel on Peatschman has far more justification to commend it. This court, of course, has no opportunity to observe the conduct and demeanor of this witness. This court cannot possibly appreciate the atmosphere or the impression conveyed by this witness on the stand. This court cannot observe the demonstrations conducted by him in the court room at the request of petitioner's counsel (288). All of these advantages were possessed by the jury and the trial court and it was proper for them to take such factors into consideration; but if the members of this court will read the cross examination of Peatschman commencing on page 271 and continuing to page 288 of the record, it will be perfectly apparent to them that Peatschman was exactly what respondent's counsel called him—an unprincipled liar. The jury had an opportunity to compare his testimony with that of an honest and truthful witness like Hannum concerning the same events and the jury and the trial court had a right to agree with respondent's counsel and to find that he was a liar and a perjurer. It is therefore a startling innovation to find counsel contending that it is misconduct to call a witness a liar. We take it the choice of words is not of vital or controlling significance. In

United States vs. Socony-Vacuum Oil Company, 310 U. S. 150,

Government counsel classified liars into three categories, to-wit: the plain liar, the damn liar and the expert witness, and claimed that those who appeared on the other side of the case fell in the worst classification of all. This court refused

to reverse because of the argument.

The credibility of Peatschman was for the jury. There are factors which this court cannot appreciate on the cold record. He told a story that was physically impossible. When estimating time, he could give the seconds; when estimating distances, he could give the inches; and he claimed to have the vision of a superman in observing persons and events and the memory of a prodigy in recalling them. His testimony was inherently contradictory and conflicting and changed with each succeeding question. It was obvious to everyone who heard him that his testimony was wilfully false. Under such circumstances it is certainly the privilege of a lawyer to speak his mind fully and frankly concerning the veracity of a witness who claimed to have performed impossible feats, and to remember things that necessarily would be beyond the comprehension of any one human being.

E.

There Is No Conflict Between the Decision Below and the Authorities Cited by Petitioner.

Each case cited by petitioner on pages 31 and 32 of his brief has been carefully read and found easily distinguishable. None except the *Johnson* and *Moquin* cases, previously discussed in this brief, is of sufficient relevance to require comment, and to point out the particulars wherein such authorities are without application or to distinguish each one in detail would unduly prolong this brief. Suffice it to say that not a single point of conflict between such authorities and the decision under review has been found.

It is submitted that the trial court and the Circuit Court of Appeals having found that the verdict was not influenced by passion and prejudice, the doctrine of the *Moquin* case would require that such finding be accepted here. It would

be most anomalous to accept the finding in that case and to reject a contrary finding in the case at bar.

That the decision below was not based solely upon a rule of practice and procedure appears from the statement that the court was impelled not to disturb the verdict by reason of "a consideration of the entire record * * *" (434).

CONCLUSION

In the light of the matters thus presented, it is respectfully submitted that the present application falls far short of the requirements prescribed by the rules of this court governing the granting of Writs of Certiorari. The petition should accordingly be denied.

Respectfully submitted,

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